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JAMES R. BROWN
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 718

BRAEBURN SECURITIES CORPORATION, an Illinois corporation,

Appellant,

vs.

ELBERT S. SMITH, Auditor of Public Accounts of the State of Illinois; **LATHAM CASTLE**, Attorney General of the State of Illinois; and **BENJAMIN S. ADAMOWSKI**, State's Attorney of Cook County, Illinois,

Appellees.

On Appeal From the Supreme Court of the State of Illinois.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

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BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

Defendants' motion to dismiss or affirm approaches the classic in its subservience to the proposition that the theme of a Brief in Opposition should be "Always Belittlin'" (Weiner, *Effective Appellate Advocacy* (1950) p. 296). To achieve this objective, their "Statement"

omits, or only partially states, many of the operative facts. Since this is a brief in opposition, reiteration of the Jurisdictional Statement will be omitted. The omissions and partial statements will be listed, *seriatim*, and, then, the legal and factual fallacies in defendants' "Suggestions", discussed.

I.

DEFENDANTS' "STATEMENT", BY IGNORING SOME AND ONLY PARTIALLY STATING OTHER OPERATIVE FACTS, GIVES A DISTORTED VIEW OF THIS CASE.

1. In summarizing the complaint, defendants mention the fact that Braeburn proposed to acquire shares in two or more Illinois Banks (Motion, p. 2), omitting to mention that what Braeburn alleged it proposed to do was acquire and hold "shares of capital stock of a bank or banks created by the laws of the State of Illinois or by any other state or by the laws of the United States * * *." (Abst. 15). Then, in summarizing the grounds upon which the complaint challenged the Illinois Act, defendants specifically mention only the claimed denial of equal protection under the Fourteenth Amendment to the Constitution of the United States (Motion, p. 3), omitting to mention the claim that the Act was void because it attempts to, "restrict the right of corporations * * * to own, hold and vote shares of the capital stock of banks created by the laws of the United States * * *" (Comp., par. 6(e); Abst. 8). These seemingly innocent omissions are vital to defendants' subsequent suggestion that the effect of the Federal Bank Holding Company Act is raised for the first time in this Court (Motion, pp. 13-14).

2. In describing the "Context of the Legislation" (Motion, p. 4) and arguing its purpose (Motion, p. 7), defendants give no citation for their conclusion that it had

become apparent that the legislation was required to restrict the development of bank holding companies and that the purpose of the Act was to prevent "greater" concentration of control over Illinois banks. There is nothing in the record to support either of these conclusions.(1) The allegations of the complaint constitute the admitted facts and the only evidence on this appeal, *Williams* v. *Kaiser*, 323 U.S. 470, 89 L. ed. 398.

This particular interpretation of the background and purpose forms the foundation for defendants' attempt to justify the legislation upon the ground that it was directed against, not present, but assumed, and anticipated, hypothetical danger, not based on any demonstrated, factual evidence (Motion, pp. 10, 12). From the commentaries on the Illinois banking situation (Jur. St., pp. 14 (fn. 3), 34-5), the purpose of the legislation might equally be said to be the protection of economically inefficient "unit banks" which do not adequately serve the existing public demand.

3. Throughout their "Statement", defendants seek to equate "bank holding company" with "branch banking," implying that the former is merely an evasive device

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(1) Of course, certain parts of the Jurisdictional Statement, particularly, point 4 (Jur. St., pp. 34-5), may, on the surface, appear to be subject to similar criticism. However, they are predicated upon published material and expressions of opinion of general availability, a technique recognized by this Court (**Muller v. Oregon**, 208 U.S. 412, 52 L. ed. 551; **Norman v. Baltimore & O. R. Co.**, 294 U.S. 240; 79 L. ed. 885; **See**: Bikle, "Jurisdictional Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action", 38 **Harv. L. Rev.** 6). They do not represent ideas resting only in the mind of the writer.

to be employed where the latter is prohibited (Motion, pp. 5, 9, 10, 11). Again, they cite no authority for this proposition and ignore the fact that it is at variance with the opinions of bankers and economists which were brought to this Court's attention (Jur. St., pp. 30, 34). By so doing, they seek to take advantage of the legislative policy of Illinois against branch banking(2) (Motion, p. 5). Through the maintenance of separate legal entities for each of the banks in which a holding company is interested, the claimed evil of remote management, not amenable to local control, is avoided in a holding company system. Thus, the benefit of the unit bank to the public is combined with increased efficiency and stability under a federally regulated holding company. (*See*: Jur. St., p. 33; *Federal Bank Holding Company Act of 1956*, 12 U.S.C. § 1841 *et seq.*)

Therefore, defendants' argument, premised upon an identification of the two methods, is unfounded in fact. This argument furnishes a basis for defendants' contention that further expansion of holding companies would be inconsistent with the public interest (Motion, p. 10). However, it ignores the fact that, *vis a vis* state banks, the question in this case is not the inherent evils, if any,

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(2) General acceptance and continuation of this policy is uncertain. Currently pending in the Illinois Legislature, is the so-called Randolph Bill which would, in effect, legalize branch banking in the Metropolitan Chicago Area (H. B. 108, introduced February 10, 1959). Recently, a committee of Chicago businessmen was formed to support this legislation, its founders stating that the reason for the committee's formation was the need for additional banking facilities in the Metropolitan Chicago Area ("68 Executives Here Back Branch Banks", **Chicago Daily News**, March 25, 1959, p. 47, cols. 5-7).

of holding companies, but rather, whether a state legislature, under the equal protection clause, can, in effect, say that only certain corporations can be bank holding companies within the state (Jur. St. 25-7), *i. e.*, those existing on the effective date of the Act, while denying the right to other corporations, such as Braeburn.

4. In discussing the reservation of rights to the states in the Federal Bank Holding Company Act (Motion, pp. 6-7), defendants entirely ignore the fact that, under Section 3(b) of the federal act, a state's intervention in opposition to a holding company's being recognized thereunder is not conclusive, even where state bank stock is to be acquired (12 U.S.C. § 1842(b)). They likewise ignore the implications for the construction of Section 7 of the federal act of the fact that Congress found it necessary to insert Section 3(d) in that act (Jur. St., pp. 32-3). As a result, they avoid consideration of the conflict between state and federal power with respect to national banks (Motion, p. 13).

5. In discussing the classification under the Illinois Act, defendants state that the permission of additional acquisitions where a holding company already owns 50% of a bank's stock, "could not make any practical difference in the extent of control", (Motion, p. 8). Without detailing situations where more than 50% control is required for corporate action, the common sense observation that the greater the control, the less the possibility of irregular or improper action being challenged by a stockholder's suit, demonstrates the fallacy of this assertion.

II.

DEFENDANTS' ARGUMENTS WITH RESPECT TO THE "EQUAL PROTECTION CLAUSE" PERPETUATE THE MISUNDERSTANDING OF THE DISTINCTION BETWEEN THAT CONSTITUTIONAL PROVISION AND THE "DUE PROCESS CLAUSE" WHICH PERVADED THE ILLINOIS COURT'S OPINION.

In suggesting that the federal questions are insubstantial, defendants rely upon the propositions that (1) the Illinois Act preserves sufficient equality by prohibiting only future expansion of existing bank holding companies, and (2) that the Illinois Supreme Court carefully considered the equal protection clause issue, (Motion, p. 12). Actually, their argument on this point begins in their "Statement" on page ten of the motion. There, they assert that the Illinois legislature decided that the present degree of concentration might safely continue but that expansion was improper, relying upon a claimed distinction between holding companies and manufacturing or commercial enterprises.

Their fundamental fallacy is that they forget that, to justify police power legislation such as the challenged Act, the reason for the establishment of a closed class must appear on the face of the act or be suggested by the record since, in the absence of such a reason, the Court has no right to conjure up possible situations which might justify the discrimination, *Mayflower Farms* v. *Ten Eyck*, 274 U. S. 266, 274, 80 L. ed. 675, 679. The complaint alleges that the failure to regulate existing holding companies with respect to their present holdings while denying other corporations the right to acquire equal holdings was an unjustified attempt to give economic advantage to members of a closed class in violation of the equal protection clause (Abst. 5-7). In discussing the limitation on future expansion, Defendants forget that the record

does not contravene the foregoing allegations which constitute a *prima facie* showing that such was the purpose of the legislation. *Williams* v. *Kaiser*, 323 U.S. 470, 474, 89 L. ed. 398, 401. Existing bank holding companies are exempted, apparently, on a legislative hypothesis that they are not harmful to the public and, therefore, did not require regulation. Absent evidence to the contrary, it would necessarily follow as a matter of logic that new bank holding companies, being the same in structure and corporate powers, are also not harmful. But the legislature impliedly made the opposite assumption as to new bank holding companies in passing the Act. Thus the statute, *prima facie*, rests upon two inconsistent assumptions concerning the same type of business. Therefore, it is plainly arbitrary. This is substantially the same factual situation which this Court found to contravene the equal protection clause in *Morey* v. *Doud*, 354 U.S. 457, 1 L. ed 2d 485.

The suggestion that the limitation upon expansion was sufficient, despite failure to require divestiture, to satisfy the requirements of the equal protection clause, conflicts with the holding of this Court in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 46 L. ed. 92, that a basis of classification resting upon size alone is improper. Defendants' argument implies that the Illinois legislature found that there were existing bank holding companies of a size which the Illinois Legislature found to be undesirable. Thus, since there is nothing in the record to suggest that bank holding companies act in concert or compete with each other, it would follow that, as competition for unit banks, either the claimed evils already existed in areas served by bank holding companies, or they did not. If the former is true, divestiture should be required. If the latter, the size of the holdings alone becomes an improper

criterion for classification. If size is not a proper criterion, then the entire statutory scheme fails of its purpose.

Thus, even upon defendants' asserted justification, the implicit classification in the Act is arbitrary and discriminatory on its face, and falls within the prohibition of the line of closed classification decisions, culminating in *Morey* v. *Doud*, 354 U. S. 457, 464, 1 L. ed. 2d 485, where this Court supplemented the rule controlling the classification of regulatory laws as laid down in *Lindsley* v. *National Carbonic Gas Company*, 220 U. S. 61, 55 L. ed. 369, 371 by adding, "discriminations of an unusual character, especially suggest careful consideration, to determine whether they are obnoxious to Constitutional provision; *Louisville Gas & E. Co.* v. *Coleman*, 277 U. S. 32, 37, 38, 72 L. ed. 770, 774." This Court has also recognized that "Arbitrary selection can never be justified by calling it 'classification,' " *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. ed. 679. Applying these rules, the allegations of the complaint make out a clear case of discrimination in favor of bank holding companies existing on the date of the Act, resulting in a denial of equal protection to Braeburn.

Defendants attempt to justify their reasoning by analogy to the Clayton and Sherman Acts. (Motion, pp. 10, 11) This analogy demonstrates that in this motion defendants have perpetuated the misconception of the difference between "due process" and "equal protection" questions manifested by the Supreme Court of Illinois in the instant decision when it relied upon *Sperry & Hutchinson* v. *Rhodes*, 220 U. S. 502, 55 L. ed. 561. (See: Jur. St., pages 27-29). The Clayton and Sherman Acts are federal legislation and subject to the limitations upon the legislative power contained in the Fifth Amendment, not the Fourteenth. Defendants' analogy is invalid because

they do not recognize the fact that the Fifth Amendment has no equal protection clause. *Detroit Bank* v. *United States*, 317 U. S. 329, 337-8, 87 L. ed. 1774.

Significantly, defendants' motion is characterized by an absence of citation to prior decisions of this Court. In view of the many "closed class" cases cited in the Jurisdictional Statement (Jur. St., pp. 26-7), this omission implies that there are not authorities to the contrary. It is also significant that defendants completely ignore, and totally fail to explain the applicability of, *Sperry & Hutchinson* v. *Rhodes*, 220 U. S. 502, 55 L. ed. 561, upon which the Illinois Supreme Court predicated its decision as to the Federal Constitutional issue and which was shown to be inapplicable in the Jurisdictional Statement (Jur. St. pp. 27-30).

Finally, defendants manifest their misconception of plaintiff's argument by asserting that what plaintiff seeks is the unrestrained right to "buy or control any Illinois banks which are now independent" or "free license to acquire any amount of stock in any number of Illinois banks" (Motion, p. 11). This is false. Braeburn relies upon the principle that, while the legislature may classify, it may not, under the guise of classification, decide who may continue in the business and *prohibit* others from engaging in the same business under the same conditions. Despite defendants' contention, this rule is equally applicable to manufacturing, commercial and banking businesses. They each constitute commerce. With respect to the right to hold stock in State banks, Braeburn does not contend that a general prohibition of holding companies would be subject to the vices asserted here. Braeburn simply contends it is entitled to acquire and hold bank stock to the same extent as existing bank holding companies, without regard to the date of acquisition.

III.

DEFENDANTS FAIL TO RECOGNIZE THE EFFECT OF STATE REGULATION OF STOCK HOLDINGS IN NATIONAL BANKS UPON THE ACCESS OF NATIONAL BANKS TO SUPPLIES OF ADDITIONAL CAPITAL.

Defendants' only answer to Plaintiff's contention that Congress may not abdicate its power to determine who may own stock in national banks to the states in which such banks are located is that the authorities relied upon are only applicable to "burdensome and discriminatory interferences" and that the issue is not before this Court since this contention was rejected by the trial court and plaintiff did not cross appeal ([3]) (Motion, p. 13).

Without reference to the other authorities cited (Jur. St. p. 32), defendants' substantive error is caused by their misconception of the basis of decision in *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579. In that case, the validity of a Maryland statute regulating the denominations in which notes could be issued by a bank which was not authorized to do business by the State Legislature

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([3]) In contending that a cross appeal was necessary, defendant misconceives Illinois law. The trial court specifically held that the challenged Acts were invalid (Abst. 20). In Illinois, a party who is successful in the trial court may not appeal because he does not agree with the reasons, findings or conclusions enunciated by that court. However, he has a right to sustain the decision on review upon any grounds warranted by the record, and is not limited to the reasons relied upon by the trial court. **Illinois Bell Telephone Co. v. Commerce Commission**, 414 Ill. 275, 111 N.E. (2d) 329. Thus, plaintiffs could not have taken a cross appeal; as defendants admit, plaintiff renewed this contention before the Illinois Supreme Court. The first time plaintiff had to assert this contention after alleging it in its complaint, other than in briefs and arguments, was in the Notice of Appeal to this Court. This was done (**See**: Point "E", Jur. St., p. 10).

and imposing a stamp tax upon the issuance of such notes was challenged by the cashier of a branch of the Bank of the United States.

After determining that Congress had power to establish the Bank of the United States, Mr. Chief Justice Marshall held that the tax could not be constitutionally applied to a branch of the Bank located in Maryland. In so doing, he rejected the argument advanced by these defendants at page 428 of Wheaton's reports, and continued by distinguishing between exercises of state power which applied to the operation of a national instrumentality and those which did not (pages 436-7 of Wheaton's reports) because, "* * * the power to tax involves the power to destroy; * * * the power to destroy may defeat and render useless the power to create. * * *" (page 431 of Wheaton's reports).

Under the present statutory scheme of privately capitalized national banks, the power to create is exercised by the creation of an investment opportunity. Bank holding company stocks, as investments, find a much more ready acceptance on the market than bank stocks. As a result, state legislation prohibiting bank holding companies from acquiring stock of national banks located within the state, if valid, interferes with such national banks' operations by denying them access to the capital market on an equal basis with national banks in states where no such legislation exists. (*)

(*) Nadler & Bogen, **The Bank Holding Company** (N.Y. Univ., 1959) pp. 35-7 where the authors point out that, and explain why, bank holding company shares are much more readily marketable than the shares of individual banks. For an explanation of why this fact supports the statement made in the text, see Appendix 1, **infra**.

IV.

DEFENDANTS IN EFFECT CONCEDE THAT THE QUESTION OF FEDERAL PREEMPTION OF THE FIELD OF BANK HOLDING COMPANY LEGISLATION IS A SUBSTANTIAL QUESTION WHICH WARRANTS THIS COURT'S TAKING JURISDICTION OF THIS CASE.

Unable to answer plaintiff's contentions on this point (Jur. St., pp. 32-3), defendants content themselves with the assertion that the question may not be raised in this Court (Motion, pp. 13-14). Apparently, they neglected to read the decisions of this Court and the opinion of the Supreme Court of Illinois in this case. The Illinois court said (Jur. St., App. "B", p. 16a):

> "In 1956 Congress adopted legislation regulating bank holding companies (12 U.S.C., pars. 1841, *et seq.*). • • • The Illinois Legislation • • • is an acceptance of the suggestion implied in the Federal act that the States should act if, as a matter of policy, bank holding company legislation more restrictive than the Federal act was desired by the States. *Further, it seems clear that such State legislation could be applicable to national as well as State banks, since the Congress did not manifest an intent to pre-empt the legislative field.* • • •" (emphasis supplied).

Without referring back to the Complaint (Abst. 8) or the decision of the trial court (Abst. 16), this disposes of defendants' contention. The Illinois court passed squarely upon this issue. When that happens, the question as to the timely raising of a federal question disappears and an irrebuttable presumption that it was properly raised arises, (*Whitney* v. *California*, 274 U. S. 357, 360-1, 71 L. ed. 1095; *Manhatton Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 134, 58 L. ed. 1245). In *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U. S. 182, 185-6, 89 L. ed. 857, this Court said:

"For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court • • • (the state court of last resort) • • •"

CONCLUSION.

For the above and foregoing reasons, defendants' motion to dismiss this appeal or affirm the judgment below summarily is without merit. The motion should be denied, jurisdiction should be accepted, and this Court should proceed to a full hearing on the merits of the cause.

Respectfully submitted,

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